

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**THE CITY OF HUNTINGTON,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 3:17-01362**

**AMERISOURCEBERGEN DRUG  
CORPORATION, et al.,**

**Defendants.**

---

**CABELL COUNTY COMMISSION,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 3:17-01665**

**AMERISOURCEBERGEN DRUG  
CORPORATION, et al.,**

**Defendants.**

**NOTICE OF SUPPLEMENTAL AUTHORITY**

The Plaintiffs respectfully submit this Notice of Supplemental Authority to inform the Court of the West Virginia Mass Litigation Panel's ("WV MLP") Order Regarding Plaintiffs' Motion to Strike Defendants' Notices of Non-Party Fault ("Order"), *In Re: Opioid Litigation*, Civil Action No. 19-C-9000, issued on July 29, 2020. The order, which applies in all opioid litigation cases before the WV MLP, concluded that the Apportionment Statutes (both the 2005 Act and the 2015 Act) have no application to Plaintiffs' claims for equitable abatement of a public nuisance and granted the Plaintiffs' motion insofar as it applies to Plaintiffs' public nuisance claims. The order is attached as Exhibit A.

First, as noted in Plaintiffs' Memorandum of Law in Support of Motion to Strike Defendants' Notices of Non-Party Fault, the 2015 Act and its predecessor, W.Va. Code Section 55-7-24, are inapplicable to Plaintiffs' claims. (Doc. 225 at pp. 2-

3). Here, as the WV MLP held, the Apportionment Statutes expressly apply only to claims for damages and do not refer to abatement or other equitable relief.<sup>1</sup> The Panel further emphasized that the Defendants' interpretation of the Apportionment Statutes to apply to equitable claims is contrary to established common law and recognized that "joint liability is subject to a different and more liberal standard in equity."<sup>2</sup> The Panel concluded that, "given the established jurisprudence marking the difference between damages and equitable remedies like abatement," "the absence of statutory language expressly including equitable remedies is both telling and determinative."<sup>3</sup>

Second, as set forth in Plaintiffs' Memorandum of Law in Support of Motion to Strike Defendants' Notices of Non-Party Fault, Plaintiffs' public nuisance claims seeking abatement as an equitable remedy are not tort actions for compensatory damages. (Doc. 225 at pp. 5-6). Here, the Panel acknowledged that payment of costs incurred to abate a public nuisance is equitable relief, rather than damages.<sup>4</sup> The Panel further recognized that "numerous courts, acting in the exercise of their equitable powers, have allowed for abatement costs regardless of whether the plaintiff sought injunctive relief."<sup>5</sup> The Panel concluded that "any payment of funds

---

<sup>1</sup> Ex. A. at 5, ¶ 6.

<sup>2</sup> *Id.* at 6, ¶ 7 (*citing McMechen v. Hitchman-Glendale Consol. Coal Co.*, 88 W. Va. 633, 107 S.E. 480, 482 (1921))

<sup>3</sup> *Id.* at 6-7, ¶ 9.

<sup>4</sup> *Id.* at 8, ¶ 12.

<sup>5</sup> *Id.* at 10, ¶ 16.

by Defendants would be not to compensate Plaintiffs for their past damages or expenditures, but to remediate the alleged public nuisance – the opioid crisis.”<sup>6</sup>

For these reasons and the reasons set forth in Plaintiffs' Memorandum of Law in Support of Motion to Strike Defendants' Notice of Non-Party Fault, the Plaintiffs respectfully request that the Court grant the Plaintiffs' Motion.

Dated July 29, 2020

Respectfully submitted,

THE CITY OF HUNTINGTON

CABELL COUNTY COMMISSION

/s/ Anne McGinness Kearse

Anne McGinness Kearse (WVSB No. 12547)

Joseph F. Rice

**MOTLEY RICE LLC**

28 Bridgeside Blvd.

Mount Pleasant, SC 29464

Tel: 843-216-9000

Fax: 843-216-9450

[akearse@motleyrice.com](mailto:akearse@motleyrice.com)

[jrice@motleyrice.com](mailto:jrice@motleyrice.com)

Charles R. “Rusty” Webb (WVSB No. 4782)

**THE WEBB LAW CENTRE, PLLC**

716 Lee Street, East

Charleston, West Virginia 25301

Telephone: (304) 344-9322

Facsimile: (304) 344-1157

[rusty@rustywebb.com](mailto:rusty@rustywebb.com)

/s/ Anthony J. Majestro

Anthony J. Majestro (WVSB No. 5165)

**POWELL & MAJESTRO, PLLC**

405 Capitol Street, Suite P-1200

Charleston, WV 25301

304-346-2889 / 304-346-2895 (f)

[amajestro@powellmajestro.com](mailto:amajestro@powellmajestro.com)

/s/ Paul T. Farrell, Jr.

Paul T. Farrell, Jr. (WVSB No. 7443)

**FARRELL LAW**

422 Ninth Street, 3<sup>rd</sup> Floor

Huntington, WV 25701

Tel: (304) 654-8281

[paul@farrell.law](mailto:paul@farrell.law)

Michael A. Woelfel (WVSB No. 4106)

**WOELFEL AND WOELFEL, LLP**

801 Eighth Street

Huntington, West Virginia 25701

Tel. 304.522.6249

Fax. 304.522.9282

[mikewoelfel3@gmail.com](mailto:mikewoelfel3@gmail.com)

---

<sup>6</sup> *Id.* at 10, ¶ 17.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on July 29, 2020, a copy of the foregoing **NOTICE OF SUPPLEMENTAL AUTHORITY** has been filed electronically using the Court's CM/ECF system and will be served *via* the Court's CM/ECF filing system, which will send notification of such filing to the attorneys of record at their e-mail addresses on file with the Court.

/s/ Anthony J. Majestro

Anthony J. Majestro